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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON

U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALFRED REDDING; MARCI'-A
BURNETT; CHERRY KING; ISM
CALDWELL,

Plaintiffs-Appellees-
Cross-Appellants,

v.

HITACHI AMERICA, LTD.,

Defendant-Appellant-
Cross-Appellee.

Nos. 01-16321, 01-16979
01-16999, 02-16653

D.C. No. CV-01-00481-WHO/
WHA

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William H. Orrick and William H. Alsup, District Judges, Presiding

Argued and Submitted June 11, 2003
San Francisco, California

Before: HILL, ** T.G. NELSON, and HAWKINS, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** Honorable James C. Hill, Senior United States Circuit Judge for the Eleventh Circuit Court of Appeals, sitting by designation.

We affirm the district court's holding that diversity is lacking between Hitachi America, Ltd. ("Hitachi") and Plaintiffs. Hitachi's statement in its answer that "the citizenship of the litigants is diverse" is not a factual admission. See Railway Co. v. Ramsey, 89 U.S. 322, 327 (1874); see also Sicor Ltd. v. Cetus Corp., 51 F.3d 848, 859-60 (9th Cir. 1995). Instead, Hitachi's statement regarding diversity merely constitutes a waiver or stipulation which cannot form the basis for jurisdiction. See United States v. Cotton, 535 U.S. 625, 631 (2002); Singer v. State Farm Mutual Auto. Ins. Co., 116 F.3d 373, 376 (9th Cir. 1997).

Also, the district court correctly applied the "place of operations test" as outlined in Tosco Corp. v. Cmtys. for a Better Env't, 236 F.3d 495 (9th Cir. 2001), to find that Hitachi's principal place of business is California. While Hitachi's admission in its answer, its use of New York as its principal place of business in past diversity cases, and its listing of New York as its principal place of business in several filings with state governments are troubling, the evidence clearly indicates that Hitachi's business shifted from New York to California prior to the commencement of Plaintiffs' cases. As a result, diversity is lacking.

Just as Hitachi should not be precluded from establishing that its principal place of business has changed, it should not benefit from the representation in its answer that diversity existed. Fundamental to our decision to affirm the district

court's determination is our assumption that if plaintiffs choose to pursue these claims in state court, principles of equitable estoppel will apply. See Mills v. Forestex Co., 134 Cal. Rptr. 2d 273, 295-96 (Cal. Ct. App. 2003).

The district court's order dismissing for lack of diversity jurisdiction is AFFIRMED.